No. 79-1380

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MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHARLES EDWARD WILSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY MEMORANDUM FOR THE APPELLANT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Appellees contend (Motion to Affirm 7-8) that Congress did not realize when it enacted 42 U.S.C. 1382(e)(1) that the statute would operate to exclude from SSI benefits patients between 21 and 65 years of age in public mental institutions. But there is nothing in the legislative record that supports appellees' contention that the statute does not mean what it says or that Congress did not know what it was doing when it enacted the statute. See *Barrett* v.

United States, 423 U.S. 212, 216-217 (1976). Moreover, Congress has reviewed the Secretary's implementation of the SSI program and has amended the statute without objecting to the exclusion at issue here. See *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6.

On January 28, 1975, approximately one year after the SSI program became effective, the Senate Finance Committee directed its staff to study the implementation of the program. See Report of the Staff to the Senate Comm. on Finance, 95th Cong., 1st Sess., *The Supplemental Security Income Program* (Comm. Print 1977). There is no indication in this detailed and thorough study that the staff in any way questioned, as being contrary to Congress' intent (or as otherwise invalid), the Secretary's determination that individuals between 21 and 65 years of age in public mental institutions are ineligible for SSI benefits.

Additionally, in October 1976 Congress amended 42 U.S.C. 1382(e)(1)(A) to provide an additional exception to the exclusion of residents of public institutions from SSI benefits. Act of Oct. 20, 1976, Pub. L. No. 94-566, Title V, Section 505(a), 90 Stat. 2686. Despite the fact that appellees had brought this lawsuit challenging the statutory exclusion nearly three years earlier, Congress did not see fit to amend the statute to provide benefits to members of appellees' class.

In any event, if appellees are correct in asserting that Congress did not intend to exclude their class from the benefits of the statute, the proper remedy

would be with Congress and not the courts. See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 90 (1977).

2. Although the Secretary initially estimated that the annual costs involved in implementing the district court's order would be $95 million nationwide (J.S. 7 n.8), more current information has been made available which indicates that the annual cost may be closer to $30 million. According to data collected by the National Institute of Mental Health (NIMH) in its annual census,[1] at the end of 1977 there were 105,789 residents of state and county mental hospitals aged 18 through 64. If all of these individuals were eligible for the $25 reduced SSI benefit,[2] the total annual cost would be in excess of $30 million.[3]

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[1] This survey will soon be published by NIMH under the title "Estimated Resident Patients State and County Mental Hospitals, U.S., 1977."

[2] In order to be eligible for the $25 payment, an individual is required to have income and resources less than the SSI limits set by the Social Security Act and to remain in the institution for a full month. For purposes of this estimate, these facts have been assumed.

[3] While the NIMH census does not contain a breakdown indicating the number of patients of public mental institutions aged 21 through 64, the 1970 census indicates that 4% of all residents aged 18 through 64 in state, county and city mental hospitals were between 18 and 21 years of age. Assuming that this percentage remained stable, there would have been 101,557 residents aged 21 through 64 at the end of 1977. Even using this lower figure, costs would exceed $30 million annually.

Appellees have estimated the nationwide costs to be closer to $6 million (Motion to Affirm 19). The data relied on by appellees is substantially less specific than the NIMH study on which we rely. Appellees' figures are not broken down into public and private facilities and are not broken down by age. Accordingly, a number of unsubstantiated inferences must be made to use this data. For example, in determining that more than half of those in mental facilities are 65 years of age or older, appeelles have relied (Motion to Affirm 18) on data in S. Rep. No. 96-416, 96th Cong., 1st Sess. 18 n.50 (1979). That report states that according to an NIMH analysis of 1975, at any one time there are 200,000 residents of state and county facilities for the mentally ill. The report further cites a 1970 Department of Justice census revealing that 113,000 of those in facilities for the mentally ill are 65 or older. Using these two statistics, appellees state that over half of the mentally ill in mental hospitals are at least 65 years old and thus not subject to the exclusion of 42 U.S.C. 1382 (e). We submit that these two statistics, which deal with different universes of individuals, cannot be meaningfully compared. Moreover, the statistics relate to two periods five years apart. Notably, during this five-year period, the total number of residents in mental institutions steadily decreased. Thus, the figures cited by appellees are not sufficiently reliable to serve as a basis for gauging the impact of the district court's ruling.

Finally, even assuming the accuracy of appellees' figures, $6 million per year is not an "insubstantial" sum (Motion to Affirm 18). The government has a legitimate interest in reversal of the judgment below to prevent an unwarranted drain on the limited funds allocated by Congress for social benefit programs such as SSI.

For the reasons stated above and in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

WADE H. MCCREE, JR.
Solicitor General

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